

No. 11,425

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN NATIONAL INSURANCE COMPANY
(a corporation),

Appellant,

vs.

CHARLES A. LECLARE, JR.,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

APPELLANT'S PETITION FOR A REHEARING.

ROYAL A. STEWART,
131 West Second Street, Reno, Nevada,

MORLEY GRISWOLD,

GEORGE L. VARGAS,
Reno National Bank Building, Reno, Nevada,

*Counsel for Appellant
and Petitioner.*

FILED

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PAUL P. O'BRIEN,

CLERK

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**Upon Appeal from the District Court of the United States
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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

Comes now the Western National Insurance Company, the Appellant in the above entitled cause, and presents this, its petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

I.

Your petitioner is aggrieved by the ruling of this Honorable Court in refusing an extension of time

within which to file its reply brief in this cause. Although it is well known to Appellant that it is within the sound discretion of this Court to refuse or allow the filing of briefs after the expiration of the time fixed by the rules of this Court; nevertheless, this Court did, on the 20th day of June, 1947, the day set for oral argument of this case, grant leave to Appellee to have printed and file his brief on or before the 25th day of June, 1947, and subsequently, on the 24th day of June, 1947, granted a further extension of time to the 2nd day of July, 1947. Under these extensions, Appellee was granted leave by this Court to file his printed brief after oral arguments were presented, and more than sixty days after the date it should have been filed in order to comply with the rules of this Court.

II.

The brief filed by Appellee contains a theory of law pertaining to contracts to renew and renewals of existing insurance, which is entirely different and distinguishable from the law applicable to the issues raised by the pleadings in this case, and although the Appellee endeavored to inject such theory of law into this case after the evidence had been closed, by moving the Trial Court for leave to amend his Complaint, the Court in sustaining the objection of counsel for Appellant and denying the motion said:

“* * * it seems to me that Mr. Vargas’ (counsel for Appellant) objection is good. He has a theory of law here. With that amendment, the basis of that theory, which has already been presented to

the jury, would be removed and for that reason the application to amend will be denied.” (Transcript p. 165.)

III.

The cause of action stated in the Complaint filed by Appellee is based upon an alleged oral contract of insurance covering a building described therein, for the amount of Five Thousand (\$5,000.00) Dollars, and the improvements on said property, for the amount of Seven Hundred (\$700.00) Dollars. The complaint contains no allegation whatsoever of a renewal or an oral contract for the renewal of the old policies in the amount of Two Thousand (\$2,000.00) Dollars and Three Thousand (\$3,000.00) Dollars which had expired. (Transcript pp. 5-6.) On the contrary, it is specifically alleged in the Complaint that the cause of action is based on an oral contract for insurance, and by the allegations contained therein the beneficiaries are different and the amounts are in excess of the insured values as set forth in the old expired policies. Now, in this Court, and for the first time, Appellee in his brief, departs from the issues raised by the pleadings and the law applicable thereto, and expounds on the theories of the law as applicable to parol contracts to renew and renewals of existing insurance contracts.

IV.

The theories of law applicable to the issues involved herein are set forth in the instructions which were given in the trial Court, and no mention whatever is

contained therein, either as to a question of fact or a question of law regarding oral contracts of renewal or oral contracts to renew. (Transcript pp. 26-36.)

V.

The extension of time requested by Appellant for filing its reply brief became necessary as a result of Appellee's apparent abandonment of the theories of law applicable to the issues joined in this case, and in the instructions given by the Court below, and then proceeding in this Court, for the first time, on the theory of law applicable to parol contracts to renew and renewals of existing insurance policies.

VI.

In view of the written argument of Appellee on the law applicable to renewals and contracts to renew existing insurance contracts, your petitioner feels that this Honorable Court may have overlooked the fact that such law is not applicable to the issues raised by the pleadings filed in the Court below, and the instructions given by the Trial Court, upon which the verdict of the jury was rendered.

VII.

That due to the delay of Appellee in the filing of his brief, your petitioner did not have an opportunity to study it prior to the hearing in this Court, and was, therefore, deprived of an opportunity to present an oral argument on the points raised therein, the authorities cited, and in particular the theory of law

pertaining to renewals, advanced therein for the first time in this case, which theory of law Appellant contends is not applicable to the issues involved in this case.

VIII.

The evidence is insufficient to support a verdict in favor of Appellee on the issues joined in this case. The cause of action stated in the Complaint filed by Appellee is based upon a new and original oral contract of insurance, and issue was joined thereon. The evidence adduced in proof of the alleged new and original oral contract of insurance, when standing alone, and considered apart from the facts relative to the old insurance contracts which had expired, is wholly insufficient as a matter of law to establish an oral contract of insurance, according to the overwhelming weight of authority.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that your petitioner be permitted to file its reply brief, and that leave be granted for re-argument.

Dated, Reno, Nevada,
September 10, 1947.

WESTERN NATIONAL INSURANCE COMPANY,
By ROYAL A. STEWART,
MORLEY GRISWOLD,
GEORGE L. VARGAS,

*Counsel for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

Morley Griswold, George L. Vargas and Royal Stewart, counsel for the above-named Western National Insurance Company, do hereby certify that the foregoing petition for a rehearing of this cause is, in our judgment, well founded and that it is not interposed for delay.

Dated, Reno, Nevada,
September 10, 1947.

ROYAL A. STEWART,
MORLEY GRISWOLD,
GEORGE L. VARGAS,

*Counsel for Appellant
and Petitioner.*